



**To: Uniformity Committee
Sales & Use Tax Subcommittee**

From: Helen Hecht, MTC General Counsel

Date: June 12, 2015

Subject: Status of the Model Sales & Use Tax Nexus Statute Project

The last call on this project was held April 24, 2015. This memo is to update the Uniformity Committee and the Sales & Use Tax Subcommittee on the status of work on the Model Sales & Use Tax Nexus Statute project.

Background:

- The project began in 2011. The initial goal was to draft a model “affiliate” or nexus provision similar to the one adopted by New York.
- In 2012, after work on that provision was winding down, the subcommittee expanded the project scope to cover nexus generally.
- The format of the draft model has also gone through substantial changes in the last 4 years.
- This year, the subcommittee has twice presented the draft model to the committee, which has referred it back for additional work both times.

Status:

The draft model statute is now in the form of a definition of “retailer engaged in business,” which is a common term used for the defined category of persons on whom a sales and use tax collection obligation is imposed. (Most states’ imposition statutes use something similar.) The draft model statute is divided into two main parts:

- A definition of “a retailer engaged in business”, which is “*a retailer, whether or not authorized to do business in this state, that has a sufficient connection with this state under the United States Constitution to be subject to sales and use tax collection duties,*” and a list of retailers included in the definition described by their activities in the state. See subsection (a) as well as related subsections (c) and (d).
- An “affiliate” nexus provision which takes the form of a presumption. See subsection (b).

Pending Issues:

Pending issues include the following:

1. Review of the changes in the most recent draft.
2. Consideration of the BNA survey results.
3. Consideration of the “trailing nexus” issue.
4. A suggestion that (some or all) of the list of activities included in paragraphs under subsection (a) be addressed in the form of a presumption similar to the “affiliate” nexus provision.

Items 1 and 2 are set out in the draft/materials posted on our website with the agenda for the June 17 call. Issues 3 and 4 are summarized below:

Trailing Nexus – Some states have adopted a rule that when a retailer’s activities in the state that give rise to nexus cease, the retailer continues to have nexus for sales and use tax purposes for some period of time. These provisions have not been widely litigated. They may serve to prevent avoidance of tax in some limited circumstances.

Suggestion to Formulate Certain Elements of the Definition as Presumptions –

In some of the earlier versions of the model, the definitional provisions listing nexus-creating activities were formulated as presumptions. There has been a suggestion that the group revisit that idea with respect at least some of the paragraphs listing nexus-creating activities under subsection (a). It is not clear to staff what the legal effect of this would be or whether it would be appropriate.